IN THE SUPREME COURT OF THE UNITED STATES

NO. 78-6932 Misc., _____ Term 1979

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SUPREME COURT, U.S.

RICHARD EARL PILON, PETITIONER

V.

COMMONWEALTH OF KENTUCKY,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY
(AND APPENDIX)

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CERTIFICATE OF SERVICE

I do hereby certify that a copy of this petition was served by depositing the same in a United States mail box, with first class postage prepaid to Hon. Patrick Kimberlin, III, Assistant Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky 40601, Counsel for Respondent, on June 29, 1979.

Terrence R. Fitzgerald
TERRENCE R. FITZGERALD

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PETITION FOR A WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Richard Earl Pilon, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit upholding the state conviction entered by the Jefferson Circuit Court, Fourteenth Division, Louisville, Kentucky.

OPINIONS BELOW

The trial court did not render a written opinion in this case. The judgment of conviction of the Jefferson Circuit Court was entered on December 12, 1975 and is reproduced at page 1 of the Appendix. The Supreme Court of Kentucky rendered a per curiam opinion on October 15, 1976, and it is reproduced at pages 2-7 of the Appendix. The United States District Court for the Western District of Kentucky rendered a memorandum opinion and entered a summary judgment on May 8, 1978, and these are reproduced at pages 8-16 of the Appendix. The United States Court of Appeals for the Sixth Circuit rendered an opinion affirming the District Court on February 26, 1979, and it is reproduced at pages 17-24 of the Appendix. The court also entered an order denying a petition for a rehearing on April 3, 1979, and it is reproduced at page 25 of the Appendix.

JURISDICTION

The final decision was rendered by the United States Court of Appeals on April 3, 1979. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

SIXTH AMENDMENT

In all criminal prosecutions the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be [illegible] cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction hereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the priviledges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

QUESTIONS PRESENTED

DID THE COURTS BELOW ERR IN FINDING THAT THE CONVICTION OF RICHARD PILON WAS SUPPORTED BY SUFFICIENT EVIDENCE TO AFFORD HIM DUE PROCESS OF LAW?

DID THE REFUSAL OF THE COURTS BELOW TO REQUIRE A JURY INSTRUCTION ON LESSER INCLUDED OFFENSES IMPERMISSIBLY PLACE UPON RICHARD PILON THE BURDEN OF DISPROVING HIS GUILT AND DEPRIVE HIM OF DUE PROCESS OF LAW?

STATEMENT OF THE CASE

The petitioner-appellant, Richard Earl Pilon, was reindicted by the July, 1975 Term of the Jefferson Circuit Court, Criminal Division Grand Jury and charged under Indictment No. 154822 with first degree manslaughter in the death of Marvin Cole Marcum in violation of KRS 507.030 (Transcript of Record, p. 2, hereinafter referred to as TR). Richard had been previously indicted for second degree manslaughter under Indictment No. 154490 (TR 3). However, the Commonwealth elected to try Indictment No. 154822 (first degree manslaughter) rather than Indictment No. 154490 (second degree manslaughter) (TR 5).

On December 1, 1975, Richard was brought to trial in the Jefferson Circuit Court, Criminal Branch, First Division, the Hon. S. Rush Nicholson presiding. On December 2, 1975, the jury returned a verdict of guilty and fixed Richard's punishment at confinement in the penitentiary for ten (10) years (TR 11). A summary of the evidence presented at trial follows.

Richard Pilon was convicted of intentionally killing his stepson, Marvin Cole Marcum. No witnesses actually saw Richard strike Marvin, and Richard testified emphatically that he did not strike the child. Testimony presented at trial showed that two other individuals, namely Marvin's mother and his sister Stacy had a substantial opportunity to injure him on the day in question. No testimony or circumstantial evidence was presented during the trial to show that Richard had any reason to harm the child or to cause the child's death. Despite this lack of intent, the trial court sustained a conviction of first degree manslaughter as defined in KRS 507.030.

The primary witness by whom the Commonwealth attempted to establish the circumstances and happenings relating to the day in question was Nola Marcum, now Mrs. Pilon. Nola testified that she and/or Richard was with Marvin at all times during the

Stacy were up and playing together when she got [illegible] on May 8, 1975, and that Marvin was playing like a normal 17 month old (TE 121-122). She then proceeded to get her uniform ready for work at 3:00 p.m. and to fix the children's breakfast (TE 124). Nola testified that she, Richard, Marvin and Stacy stayed at their mobile home until it was time for Nola to go to work around 2:30 p.m.

When they arrived at her place of employment, Marvin became sick and vomited in the car. After punching in, Nola came back out and cleaned up the mess. She thought Marvin had "the flu or virus, and he was vomiting an awful lot, and he had diarrhea, and had been sick" (TE 126-127). Earlier in the day, Nola had given him an aspirin and orange juice (TE 126). She was not concerned about leaving Marvin with Richard. Her only concern was that Marvin wasn't feeling well (TE 127).

Nola had previously been concerned about Marvin because of his clumsiness and falling. In September or October of 1974, Marvin had fallen and received a knot on his forehead. The build up of blood under the knot caused him to be very clumsy (TE 123-124). When she took Marvin to Pediatric Associates (Dr. Doyle's office) on April 11, 1975, for a physical, she discussed Marvin's fall with the examining doctor (TE 122-123).

At approximately 5:00 p.m., Richard called Nola to give her the results of a follow-up examination of Richard's hand, which had been stitched a week or two previously. Richard also told her that Marvin was playing with his sister in their room but was not as active as usual. Around 6:00 p.m., Richard called again to say that Marvin was really sick. He wanted to get Nola and take Marvin to the hospital. Nola told him to pick her up at work (TE 127-128). At 6:30 p.m., Nola punched her time card and she, Marvin, and Stacy drove straight to Norton-Childrens Hospital (TE 128). She said that she did not see any bruises on his body on the way to the hospital when pulling his pajama top up to check his breathing (TE 131-132). When they arrived, Nola jumped out of the car and told a doctor her baby was sick and she needed

help fast. The doctor went out to the car, looked at Marvin, picked him up and ran in the hospital. Nola followed, but they would not let her go with them. She was required to sign some papers and wait while they did what they could (TE 130).

Dr. Harold Harrison, a pediatric resident at Nortons Childrens Hospital, testified that Marvin was dead on arrival at Norton-Childrens Hospital and that efforts made to revive the child were to no avail (TE 68-69). He placed the time of the child's arrival at the hospital at approximately 6:30 p.m. on May 8, 1975 (TE 75).

Dr. Harrison stated that photographs of Marvin's body indicated bruising. He further stated "any type of trauma does leave some degree of trauma, that something has occurred, what degree, or force, it took to make those lesions I couldn't tell you. I will just say that there is evidence of trauma that is exemplified by the bruises." (TE 72). When asked "After having seen those if a person were to say he slapped a child with his hand, could you leave that kind of a bruise, an open hand?", Dr. Harrison replied, "Again, any type of trauma could, regardless how it was sustained, could lead to bruises as you see there to the infant." (TE 73).

Dr. Harrison stated his report indicated gross evidence of "ecchymosis" and that ecchymosis is synonomous with bruises and "a bruise is, as we said, a bruising under the skin. It can result from trauma to the skin. There are instances where certain illnesses can cause bleeding under the skin." (TE 80). In addition, "There are certain intraperitoneal hemorrhages that give certain signs of discoloration to the flank regions, that have certain names" and that the spleen is in this area, the upper left quadrant (TE 82). Dr. Harrison has no personal knowledge that any tests were performed nor records which would indicate that any tests had been performed on the blood of the deceased (TE 83-84).

Dr. Harrison stated it was possible for the spleen to rupture by itself, without any trauma whatsoever, and that spontaneous rupture results from certain diseases, such as sickle cell anemia, infectious mononucleosis, and some other diseases. "It could come up with other illnesses that can cause spleenic enlargement, and with that in mind anytime you have an organ that would be enlarged, it again stands a chance to be more susceptible to injury." (TE 85).

When asked, "You could not tell me then exactly what did cause the death, whether it was disease, or whether it was trauma, as is being contended. Is that correct?", Dr. Harrison replied, "From the information I had available to me, I could not give you an exact answer. The circumstances were such that an autopsy was needed to try to arrive at possible ideology."

Dr. Stuart Wolfson, a resident in pathology at General Hospital, testified for the Commonwealth of Kentucky that Marvin Cole Marcum died of a loss of blood, secondary to a laceration of the spleen. He further testified there was evidence of trauma to the spleen and laceration of the spleen is caused by trauma (TE 110). To Dr. Wolfson, the spleen did not look infected and trauma was the apparent cause of the laceration, but he did not perform any tests or take blood samples or perform any lab work on the spleen other than looking, because he was not asked to perform this work (TE 115-116).

Dr. Wolfson testified that there will sometimes be a collection of blood in the skin which appears to be bruises if the body has lain overnight before an autopsy is performed (TE 117). In this case, approximately 14 hours had elapsed before Dr. Wolfson performed the autopsy (TE 114). At no time during his testimony did Dr. Wolfson state the bruises on the deceased's body were the result of trauma rather than a blood disorder or blood collection in the skin after death. Dr.

Wolfson placed the time elapsed from receipt of the ruptured spleen to the death of the deceased as a maximum of seven, eight, or eight-and-one-half hours, or between 10:00 a.m. and expiration at 6:30 p.m. (TE 118-119). It is to be noted that Marvin and Stacy had been playing together in the home and were already up when Richard arose around noon.

Dr. John Doyle, the deceased's pediatrician, testified that Marvin had a history of respiratory infections and a bronchial infection which showed up secondarily in the blood system (TE 100-104). On April 11, 1975, Dr. Doyle examined Marvin and there were no particular physical problems except for toeing out or toeing in. He did not recall from memory and his records did not reflect any conversations with Nola concerning Marvin's falling, nor would he have been upset upon hearing of this when a child is first learning to walk (TE 104-105).

When asked to examine photographs of Marvin's body, Dr. Doyle stated that the bruises "would seem to be more than usual" in an ordinary active child falling down. However, Dr. Doyle stated he did not ordinarily examine children that are deceased (TE 106-107). He did not express any opinion as to the origin of the bruises and the cause of death.

At this stage of the proceedings, the Commonwealth rested its case. Defense counsel moved for acquittal because the Commonwealth had failed to prove the corpus delecti of first degree manslaughter and there was absolutely no proof that Richard struck the deceased. The court overruled the defense motion (TE 133-134). Defense counsel also moved for a directed verdict of acquittal because the circumstantial evidence presented was as consistent with innocence as guilt. The court also overruled this motion (TE 134).

Mrs. Jane Risinger, Nola Marcum's mother and the deceased's grandmother, testified for the defense that the deceased was clumsy and had fallen at her camp on Rough River

the week before his death and that [illegible] the marks on his body. She also stated that on at least one previous occasion Marvin had climbed out of his baby bed and fallen onto the chair located next to the bed and hurt himself. Mrs. Risinger explained the bruises on Marvin's spine as being the result of his sliding out of his high chair after eating (TE 161-168).

Richard Pilon also testified in his own defense. His testimony was substantially the same as Nola's regarding the events of May 7 and 8, 1975. He testified that Marvin had had the flu for two or three days prior to May 7, but on that day he seemed fine and all four of them (Marvin, Stacy, Nola and Richard) went fishing. Afterward they went to a drive-in movie, getting home around 4:00 a.m. in the morning. When Richard and Nola got up on May 8 around noon, they discovered the children had already been up for awhile. Richard fixed breakfast for the children while Nola got her uniform ready for work. Around 2:30, all four of them drove to where Nola worked. After she punched in for work, Marvin became very sick, so Nola came back out to the car and cleaned up the mess and then returned to work (TE 138-141). She gave Richard her medical assistance card and told him to take Marvin to the hospital or to call her if he got worse. This was around 3:15 p.m. on May 8, 1975 (TE 141).

Richard testified he drove directly to Dr. Kincaid's office after taking Nola to work, because he had stitches in his right hand as a result of surgery the week before to the tendons of the middle two fingers. He said he had approximately twenty-some stitches in each finger (TE 141-142). Richard subsequently removed the stitches himself while he was in jail, sometime after May 29, 1975, the day he was incarcerated on the instant charge (TE 183). While at Dr. Kincaid's office, the doctor remarked that Marvin looked a little under the weather and asked if Marvin had been to see a doctor lately.

left Dr. Kincaid's office (TE 142). Richard drove to Richard Childer's house and, after staying a few minutes, went home (TE 143).

Richard stated that Marvin seemed to be getting weaker and weaker when they got home, so he put Marvin to bed and checked on him. Around 6:00 p.m., Richard called Nola at work and told her Marvin was worse. Richard picked her up at work and drove directly to the hospital (TE 144-145). Richard explained that he had waited to call Nola, instead of taking the child to the hospital himself because he was not the legal guardian and could not find the legal papers. Even though he had her medical assistance card, Richard feared that the hospital would not treat Marvin, and that using the card would only get Nola and her welfare worker into trouble (TE 145).

Richard knew Marvin had two bruises on his face before going to the hospital, one of them from falling (TE 147). Marvin had scraped his legs on a seesaw two or three days before his death when he fell off. His sister received a black eye as a result of his fall. Marvin also bruised his spine when he slid out of his high chair (TE 148). Richard testified that Marvin was clumsy, could not walk straight, and veered off to the right. He stated that these tendencies had begun about a month or a month and a half after he had fallen and put a knot on his head, and that it had taken that long for Marvin to get up and try to walk again (TE 149). Richard testified he did not see Nola strike Marvin, nor did he see Stacy strike him, and that he himself did not strike Marvin (TE 155-156).

Despite defense counsel's objection, the Commonwealth was then permitted to introduce Dr. Charles Kincaid as a rebuttal witness (TE 170). Dr. Kincaid stated that Richard did not have stitches in his right hand on May 8, 1975, as this was approximately two months after the surgery which had been done in March (TE 179). The doctor noted that Richard could bend his finger with great difficulty on

May 8, 1975, and he was treating Richard to help him further

bend his finger (TE 179). Dr. Kincaid testified that, after noting some bruises on Marvin's forehead and some of the exposed areas of the child, he had remarked to Richard that the child appeared gravely ill and should see a physician (TE 175-179).

Richard returned to the stand to rebut Dr. Kincaid's testimony, saying that the operation was around May 1, and that he had taken the stitches out of his hand himself while in jail, sometime after May 29, 1975 (TE 183). At the conclusion of the case, defense counsel renewed his motion for a directed verdict based on the Commonwealth's failure to prove the corpus delecti, asserting the circumstantial evidence was as consistent with innocence as guilt and that Richard should accordingly be granted a directed verdict of acquittal. The court overruled these motions (TE 185).

Defense counsel asked for instructions to the jury on reckless homicide, but the court refused to give these instructions. However, the court granted defense counsel's motion for instructions regarding intent to inflict harm or death as one of the elements of first degre manslaughter (TE 185-188). The court did not instruct the jury on any lesser degrees of the offense.

On December 12, 1975, the jury returned a verdict of guilty of first degree manslaughter and fixed Richard's punishment at ten years in the penitentiary (TE 215-216). On December 12, 1975, defense counsel filed an affidavit in support of a motion for a new trial, based in part on newly discovered evidence. In the affidavit, counsel stated he talked to Dr. Kincaid on December 11, 1975. Dr. Kincaid had reviewed his records and stated that he operated on the petitioner's hand on April 27, 1975 (not in March as he testified under oath). Dr. Kincaid further stated that Richard might have had stitches in his hand on May 8, 1975, but his records did not indicate the absence or presence of stitches (TR 15). On December 12,

1975, the motion for a new trial was overruled, and judgment was entered in accordance with the verdict (TR 12-13). After exhausting his remedies in the state appellate courts and the federal courts below, Richard Pilon now seeks relief from this conviction in this Court.

REASONS FOR GRANTING THE WRIT

I. THE COURTS BELOW APPEAR TO HAVE ERRED IN FINDING THAT THE CONVICTION OF RICHARD PILON WAS SUPPORTED BY SUFFICIENT EVIDENCE TO AFFORD HIM DUE PROCESS OF LAW.

In reviewing the conviction of Richard Pilon, both the district court and the circuit court reviewed the record to determine whether there was sufficient evidence to support the verdict. The standard applied by both courts was limited to determining whether the conviction was totally devoid of evidentiary support. The standard of review appears to be inconsistent with minimum standards of due process of law as interpreted by recent decisions of this court. However, even under this minimum scrutiny standard, the evidence against Richard Pilon adduced at trial was inadequate to sustain a conviction, since the Commonwealth was relieved of proving crucial elements of the offense.

The standard of review applied by the lower federal courts was not whether sufficient evidence was produced to proove guilt beyond a reasonable doubt but whether any evidence supported the conviction. Application of a standand of proof inferior to proof beyond a reasonable doubt has consistently been held by this court to deny due process of law. See, e.g., Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Appellate courts have long been reluctant to disturb jury findings. However, verdicts will be reviewed to determine if they are supported by competent and substantial evidence. Mortenson v. United States, 322 U.S. 369, 64 S.Ct. 1037, 88 L.Ed. 1331 (1944). "[I]t is always appropriate for the appellate court to review the sufficiency of the evidence." Smith v. United States, 431 U.S. 291, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977). To give meaning to the due process requirement of proof beyond a reasonable doubt, the requirement of substantial evidence to support

a conviction is essential. The clear implication of recent decisions is that evidence is substantial only if it establishes that it is more likely than not that the defendant committed the offense. See, e.g., Mullaney v. Wilbur, supra, at 421 U.S. 703, 95 S.Ct. 1892, where the Court held that a conviction based upon evidence which only made guilt as likely as not offended due process.

The lower federal courts in the case at bar applied a standard of review which falls far short of due process requirements. The federal court system, even when acting on habeas corpus petitions, should enforce the minimum standards of due process to ensure that due process of law has a uniform meaning in all criminal cases.

The evidence adduced at Richard Pilon's trial was grossly inadequate to sustain a conviction. Far from establishing that Pilon's guilt was more likely than not, the Commonwealth failed entirely to produce evidence relating to vital elements of the offense.

Vital elements of the offense of manslaughter in the first degree under The Kentucky Revised Statutes (KRS 507.030) include (1) intent to cause serious physical injury to another person and (2) causation of the death of such person. The Commonwealth failed to produce any evidence that Richard Pilon intended to injure Marvin or that Richard Pilon actually did cause the death of Marvin. In Vachon v. New Hampshire, 414 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974), this Court, citing Harris v. United States, 404 U.S. 1232, 92 S.Ct. 10, 30 L.Ed.2d 25 (1871), stated that "it is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged. . . . violate(s) due process." In that case, the Court reversed a decision of the New Hampshire Supreme Court upholding the conviction of a store operator for contributing to the delinquency of a minor. The facts in evidence tended to show that the minor in question had entered defendant's shop and purchased an allegedly obscene button. The Court held that, even though there was evidence to show that the defendant

controlled the shop on the date in question, this evidence could not fill the fatal void created by the fact that no evidence was produced to prove that the defendant had personally sold the button to the minor. In the instant case, the Commonwealth presented evidence to show that Richard Pilon was with Marvin during at least part of the time during which the medical evidence established that the injury occurred. However, the evidence established that Nola and Stacy also had an opportunity to commit the crime. The medical testimony indicated that Marvin appeared to have been injured within 8-1/2 hours of his death. Thus, he could have been injured any time between 10:00 a.m. and 6:30 p.m. on the day in question. According to Nola, she and Richard did not get up until around noon, at which time Stacy and Marvin were already up and playing in the home. It is obvious that Marvin could have been injured by Stacy or could have accidentally injured himself before Nola and Richard got up. It is equally possible that Nola got up before noon, injured Marvin, and went back to bed. The Court of Appeals misapprehended these facts and held that Richard Pilon had complete control of Marvin.

Thus, proof that Richard Pilon was one of at least three persons who could have infliced injury to Marvin clearly does not rise to the level of establishing that he actually did injure Marvin. For this reason, his opportunity to commit the crime was totally insufficient to establish that he caused Marvin's death.

The vital element of causation is also not supported by evidence that the injury was caused by trauma.

The Commonwealth repeatedly characterized the injury as a result of a brutal beating or a severe trauma. However, this interpretation of the injury is totally unsupported by the medical testimony. Dr. Harrison repeatedly declined to express an opinion on the degree of trauma which would be required to cause the bruises he observed. Moreover, he acknowledged that it was possible for the spleen to rupture spontaneously without any trauma, and he was unable to express a firm opinion on the cause of death. Dr. Wolfson testified that trauma was the apparent cause of the laceration of the spleen which he observed, but he did not state that a brutal beating or a severe trauma was required to produce the laceration. Dr. Doyle merely noted more bruises than normal in a child at that age, but he expressed no opinion on the origin of the bruises or the cause of death. In short, the medical evidence tended to establish a single fresh injury which could have been incurred spontaneously or without trauma. In short, the Commonwealth's evidence does not establish that Marvin's death was caused by Richard Pilon or anyone else.

The Commonwealth failed to present any relevant evidence concerning the vital element of intent. The only evidence of Richard Pilon's state of mind offered by the Commonwealth was Richard's failure to seek medical treatment for Marvin after Dr. Kincaid advised Richard that the child appeared to be gravely ill. The district court correctly concluded that this was "a factor not in itself establishing guilt, but indicating a lack of concern for the child." Indeed, a lack of concern for the child could have supported a conviction for reckless homicide rather than murder.(The refusal of the state trial court to give a

requested instruction on reckless homicide is discussed in the second argument). However, Richard was convicted of first degree manslaughter under KRS 507.030, which has an indispensible element of intent to cause death or serious physical injury. The evidence tending to show Richard's lack of concern suggested at most that he acted wantonly or recklessly by delaying treatment for Marvin until Nola got off from work, and neither wantonness nor recklessness would suffice as a culpable mental state for first degree manslaughter. Therefore, his lack of concern was not evidence upon which his guilt of first degree manslaughter could be predicated.

Finally, the lower courts misinterpreted the medical evidence as indicating that a battered child was involved. It is true that Dr. Harrison testified that he saw a sufficient number of bruises and abrasions on the child to make him contact the authorities to obtain photographs of the body. However, Dr. Harrison at no time referred to Marvin as a battered child. Moreover, he acknowledged that the various bruises and abrasions, which appeared to have been incurred at different times, could have been caused by any degree of trauma from any source. Thus, the record is totally devoid of any evidence that Marvin died as a result of being battered by Richard or anyone else.

In allowing the conviction of Richard Pilon to stand, the lower federal courts have perpetuated the denial of due process which has resulted from relieving the Commonwealth of its duty to produce relevant evidence of every crucial element of the offense charged. Vachon, supra. This doctrine has been further explained and emphasized in Mullaney v. Wilbur, supra, where the court held that due process was offended whenever the state was relieved of the duty of proving a critical fact in dispute in a homicide prosecution beyond a reasonable doubt. The term "critical fact in dispute" obviously means any fact that is put at issue by the evidence. If the presence or absence of this fact would have a substantial

impact upon the defendant's liberty interest and the determination of this fact on a less than reasonable doubt basis would increase the likelihood of an erroneous murder conviction, then due process is denied.

Applying the Mullaney standard to the case at bar, it is clear that the Commonwealth was relieved of the duty of proving several critical facts in dispute beyond a reasonable doubt. Although the Commonwealth was indeed required to establish that Marvin sustained some sort of traumatic injury and that Richard had an opportunity to inflict it, the Commonwealth was relieved of the burden of proof (1) that a traumatic injury was actually inflicted, (2) that Richard inflicted it, and (3) that he did so intentionally. In effect, the Commonwealth was allowed to build a pyramid of inferences which had as its base the tentative inference of trauma, upon which were laid the less certain inferences that Richard caused the trauma with the intent to kill the child. This pyramid of inferences did not establish that Richard's guilt was more likely than not, as required by Mullaney. His conviction was thus so totally devoid of evidentiary support that it denied him due process of law. This Court should hear and decide this case in order to clarify the correct standard of review of state criminal convictions and the meaning of reasonable doubt as applied to jury verdicts which are not supported by substantial evidence.

II. THE REFUSAL OF THE COURTS BELOW TO REQUIRE A JURY INSTRUCTION ON LESSER INCLUDED OFFENSES IMPERMISSIBLY PLACED UPON RICHARD PILON THE BURDEN OF DISPROVING HIS GUILT AND DEPRIVED HIM OF DUE PROCESS OF LAW.

It is now well established that a state instructional error can so weaken the reasonable doubt standard as to deny the defendant due process of law. See Taylor v. Kentucky, ___U.S.___, 98 S.Ct. 1930,___L.Ed.2d___(1978); Mullaney v. Wilbur, 421 U.S 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). Subsequent to the state appeal in the case at bar, this principle has been repeatedly recognized in Kentucky. In Pace v. Commonwealth, Ky., 561 S.W.2d 664 (1978), the court specifically held that testimony tending to establish the inconsistent defenses of accident and self-defense entitled the defendant to instructions on both defenses. In Martin v. Commonwealth, Ky., 571 S.W.2d 613 (1978), the court held that a defense claim of right to enter the premises, which was inconsistent with the theory of criminal trespass, did not relieve the court of the duty to give a trespass instruction as an offense included in the crime of burglary. The opinion in Martin also endorsed the earlier holding in Trimble v. Commonwealth, Ky., 447 S.W.2d 348 (1969), that a defense of alibi does not relieve the court of a duty to instruct on an included offense if there is any evidence to support a conviction for it. The relevant principle to be distilled from all of these cases is that an instruction on an included offense should be given whenever there is any evidence from which the jury could entertain a reasonable doubt about the degree of the offense and conclude that the defendant is guilty of a lessser offense rather than the greater offense. The courts below recognized this principle but declined to apply it to the facts on the theory that the evidence in the case at bar did not support a conclusion of reckless homicide. A review of the relevant facts on this issue follows.

At his state trial, Richard was denied an instruction on the included offense of reckless homicide under KRS 507.050. Under this statute, "a person is guilty of reckless homicide when, with recklessness he causes the death of another person." KRS 501.020(4) provides as follows:

> "Recklessly" - A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reaaonable person would observe in the situation.

Thus, Richard would have been guilty of reckless homicide if, through a deviation from the standard of care of a reasonable person, he failed to perceive a substantial and unjustifiable risk that Marvin would die and thereby caused his death.

The courts below acknowledged the foregoing principles of state law. However, the conclusion of the state appellate court that there was no evidence tending to support a conviction for reckless homicide was ratified by the court of appeals in the following terms:

> The jury might have found that Pilon did not beat the victim but acted culpably in not taking the victim to the hospital after Dr. Kincaid recommended that Pilon do so. This would not have constituted reckless homicide, however, since the advice of Dr. Kincaid would have made Pilon aware of the risk to the victim if not taken to the hospital. Reckless homicide is defined to occur when one "fails to perceive a substantial and unjustifiable risk" of death. K.R.S. §§507.050(1); 501.020(3) (emphasis added).

This conclusion appears to have overlooked Pilon's specific denial that he was made aware that the child was gravely ill. In view of this denial, the jury was not obligated to believe Dr. Kincaid's testimony that he warned Richard of the child's grave condition, nor was the jury bound to conclude that Richard heard any such statement which Dr. Kincaid might have made. Rather,

the jury could have concluded that Richard lacked awareness of the grave condition through gross neglect and that, in failing to have Marvin treated for his injury regardless of its cause, Richard created a substantial and unjustifiable risk of death which would have supported his conviction for reckless homicide.

In addition to misapprehending the facts in this regard, the lower federal courts appear to have misapprehended the applicable law. Under established principles of state law, an instruction on an included offense should be given whenever there is any evidence from which the jury could entertain a reasonable doubt about the degree of the offense and conclude that the defendant is guilty of the lesser offense rather than the greater offense. See, e.g., Martin v. Commonwealth, Ky., 571 S.W.2d 613 (1978); Lutrell v. Commonwealth, Ky., 554 S.W. 2d 75 (1977); Trimble v. Commonwealth, Ky., 447 S.W.2d 348 (1969). However, the court of appeals stated in footnote 4 of its opinion that the refusal of the state court to give the requested included offense instruction "was necessarily correct as a matter of state law," and that "the issue would instead be whether state law on the matter violated due process."

In Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), the court was faced with the refusal of a state court to give an instruction in a murder prosecution on the included offense of voluntary manslaughter. The state court based its refusal on a state rule of law placing the burden on the defendant to prove heat of passion or sudden provocation. The United States Supreme Court held that this shifting of the burden of proof violated the constitional guarantee of due process of law. Although the violation in Mullaney resulted from the correct application of an established principle of state law, it is obvious that due process is equally offended by an unwarranted departure from state law which similarly shifts the burden of proof. In the case at bar, by accepting the controverted testimony of Dr. Kincaid as true, the court has perpetrated the error of the state court by imposing upon Richard Pilon a heavy if not impossible burden of overcoming Dr. Kincaid's testimony. Pilon emphaticaly denied that Dr. Kincaid made him aware that the child was gravely ill. The jury was as entitled to believe this denial as it was to believe the testimony of Dr. Kincaid. This is especially true since Dr. Kincaid acknowledged after the trial that his memory was in error in another respect, namely the month in which he had operated on Richard's hand before the day in question. To require Pilon to do more is to shift the burden of proof in violation of the principles articulated in Mullaney.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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